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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 2 Misc.

WILLIAM HENRY ROBERTS,

Petitioner,

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

BRIEF FOR PETITIONER

MAX RADIN,
Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA, THE HONORABLE FRED M. VINSON, THE CHIEF JUSTICE

No. 2 Misc.

WILLIAM HENRY ROBERTS,

Petitioner,

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION, AND THE HONORABLE DAL M. LEMMON, JUDGE, PRESIDING,

Defendant/Respondent

STATEMENT OF FACTS

The petitioner in this case, William Henry Roberts, was convicted of a felony in the County of Contra Costa in the State of California and sentenced to be imprisoned for a term of years in the Folsom Prison at Represa, in Sacramento County in the State of California. He is confined there at the present time.

He seeks to secure an injunction in the United States District Court for the Northern District of California against the authorities of the prison at Represa, and as the first step in the process of doing so, he petitioned the District Court for permission to proceed *in forma pauperis*. This petition was denied by the District Court, the Honorable Dal M. Lemmon presiding, on December 23, 1948, by the following order:

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

WILLIAM HENRY ROBERTS, ex rel, et al. INMATES OF THE CALIFORNIA STATE PRISON FOR MEN, at Represa, California, Relator,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS, RICHARD A. McGEE, Director, and ROBERT A. HEINZE, Warden, et al., Respondents

William Henry Roberts requests leave to file an action in forma pauperis. In the action an injunction is sought enjoining the prison authorities at a California Prison from enforcing certain rules and an attack is made upon certain sections of the California Penal Code on constitutional grounds.

The supporting affidavit states that he is a citizen. It appears that he is a prisoner confined in that prison. He has been convicted of a felony. California Penal Code, Section 18. As such he is not a citizen. Austin v. United States, 40 F. Supp. 977; Amy v. Smith, 11 Ky. 326. His request is denied, 28 U.S.C., Section 1915. Dated: December 23, 1948.

DAL M. LEMMON,
United States District Judge.

He then petitioned for an extension of time for filing a petition for a rehearing, which was denied on January 3, 1949 by the same court and judge in the following order:

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

WILLIAM HENRY ROBERTS, ex rel, et al. INMATES OF THE CALIFORNIA STATE PRISON FOR MEN, at Represa, California, Relator,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS, RICHARD A. McGEE, Director, and ROBERT A. HEINZE, Warden, et al., Respondents

Relator William Henry Roberts has directed to me an application for extension of time for filing petition

for rehearing: In the application he states that on the 23rd day of December, 1948 I "denied the said application for the injunction." In this he is in error. I have never denied his application for injunction. I have denied his application to appear in forma pauperis.

His application for extension of time to file petition for rehearing is denied.

Dated: January 3rd, 1948.

DAL M. LEMMON,
United States District Judge.

Thereafter he applied to the Supreme Court of the United States for additional time in which to file a petition for allowance of an appeal in the matter, and on January received from the Clerk of the Supreme Court the following letter:

January 21, 1949.

Mr. William Henry Roberts
Represa, California

DEAR SIR:

Your application for additional time within which to file petition for allowance of an appeal in the case of Roberts et al. v. State of California Department of Corrections et al., was received yesterday and presented to Mr. Justice Douglas.

The application has been returned endorsed "Denied for lack of authority to extend the time."

For your information there is no statute or rule which permits this court or a justice thereof to extend the time for making application for the allowance of an appeal to this court from any court.

Yours truly,

CHARLES ELMORE CROPLEY,
Clerk,

By H. B. WILLEY,
Deputy.

This was followed by a telegram, dated "Washington, D. C. 11:46 A.M. Jan. 21, 1949" and addressed to William Henry Roberts at Represa, California to the following effect:

> "Justice Douglas has denied your petition for allowance of appeal with notation that appeal should be to Court of Appeals.
>
> CHARLES ELMORE CROPLEY, *Clerk.*"

He then filed an appeal in the Ninth Circuit Court of the United States, and this appeal was denied on January 27, 1949, by the Circuit Court by the following order:

> Roberts petitions for allowance of an appeal from a judgment in the United States District Court for the Northern District of California, denying him the right to sue in forma pauperis.
>
> This court has no power to grant an application for allowance of an appeal. The petition is dismissed.
>
> WILLIAM DENMAN,
> HOMER T. BONE,
> WILLIAM E. ORR,
> *Judges, United States Court of Appeals, Ninth Circuit.*

He next applied for a stay of proceedings, which was denied on February 7, 1949 by the same Circuit Court and the same judges.

The present petition attested March 30, 1949, was then filed on April 5, 1949, of which the concluding paragraph, (numbered XIV) is to the following effect:

> WHEREFORE Comes now your petitioner William Henry Roberts, in propria persona, and respectfully prays for a Writ of Mandate to issue under the 'Seal' of the Supreme Court of the United States of America pursuant to the Congressional Act made and provided therefor, Directed and Commanding the United States

District Court for the Northern District of California, Northern Division and the Honorable Dal M. Lemmon, Judge thereof: at Sacramento, California:

To FORTHWITH: Allow and permit the petitioner herein William Henry Roberts to file and proceed in forma pauperis his petition for Interlocutory Injunction numbered 488-Misc. application to proceed in forma pauperis denied heretofore shown in the said District Court of the United States of America: The Petitioner Further Prays: That the said Writ of Mandate may further Command that the said United States District Court and Judge thereof; shall forthwith request the assistance of two other Judges in conformity with Section 380, Title 28 U.S.C. (Judicial Code) and that said matter shall be heard and determined solely upon its merits.

Petitioner Will Ever Pray:

Respectfully Submitted,

WILLIAM HENRY ROBERTS,
Petitioner.

BRIEF FOR THE PETITIONER

I

The motion for an order directed to the District Court for the Northern District of California to permit the petitioner to proceed in forma pauperis is a proper motion in this case.

The Petitioner throughout, following the terminology used in California, refers to the writ he seeks as a "writ of mandate."

By the Federal Rules 81b, the writs of *scire facias* and *mandamus* were abolished. The Rule then states:

> "Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

It should be said first of all, that the rule abolishing mandamus applies only to the District Courts and has no application to the appellate courts.

Armour & Co. v. *Kloeb*, 109 F. 2d 72;

Ex parte Fahey, 332 U. S. 219, 67 Sup. Ct. 13, 88 L. Ed. 3.

But in any case it has been frequently decided that the abolition of the writ did not abolish the remedy but merely abolishes the form by which the remedy may be obtained.

Brown v. *Beckham*, 137 F. 2d 644, cert. den. 320 U. S. 803;

Youngblood v. *U. S.*, 141 F. 2d 912, 915;

Hammond v. *Hull*, 131 F. 2d 23.

The test would be whether under previously existing rules applying to the writ of mandamus, the petitioner would in this case be entitled to the relief sought, however he may have named it.

Hammond v. *Hull*, 131 F. 2nd 23;

DeFoe v. *Rhea County, Tenn.*, 8 Fed. Rules Serv. 81 b, 22, Case 1.

II

Mandamus would have been the proper remedy in this case under established rules.

It is overwhelmingly established that the writ of mandamus will lie to compel a court to take jurisdiction of a case properly before it. Cf. *In re Morrison*, 147 U. S. 14. This case is merely one of a long list of cases that begin with *Marbury* v. *Madison*, 1 Cranch, 137.

The first and most important condition is that there is no other legal remedy, especially if an appeal will not lie.

In re Gayle, 136 F. 2nd 973.

A superior tribunal may by mandamus command an inferior court to perform a legal duty, where there is no other remedy and the rule applies to judicial as well as to ministerial acts. *Ex parte Newman*, 81 U. S. 152, 20 L. Ed. 877.

As examples of what has been regarded as a proper case, it has been held that the remedy is available where a single judge fails to request the convening of the statutory three-judge court. *Osage Tribe* v. *Ickes*, 45 F. Supp. 179; or when the court has erroneously abated an action on the ground that the plaintiff has become an alien enemy.

Ex parte Kawato, 317 U. S. 69, 63 Sup. Ct. 115, 87 L. Ed. 58.

There is no doubt that a superior tribunal may not compel an inferior one or any administrative body to perform an act lying within its discretionary powers, unless discretion has been clearly abused. But in this instance, the court has no arbitrary discretionary power to refuse the petition to proceed *in forma pauperis*.

The proceedings are governed by § 1915 of the new United States Code of Judiciary and Judicial Procedure, published as Title 28 of the United States Code, Congressional Service.

The Section states:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

While the statute uses the word "may," it is obvious that the word is not to be understood as merely permissive. The second paragraph of Section 1915 indicates that the power to deny it can be exercised only in a certain way and upon a definite condition. The court must be satisfied that the petition is not in good faith and must so certify in writing.

If we look at the District Court's order (App. III), it is plain that the Court does not base its denial on the absence of good faith or of a meritorious cause of action. The court asserts that the petitioner is not a citizen and therefore that under Section 1915, which speaks of "citizens," it has no power to grant the petition to proceed as a poor person. The plain issue presented, therefore, is whether it is in fact the case that the petitioner is not a citizen of the United States and therefore does not come within the class of persons who under the wording of Section 1915 may be authorized to proceed without payment of fees or costs.

That the remedy by mandamus is an extraordinary remedy and that it will not lie when any other remedy is available or when the question is moot or when the act sought to be ordered is a useless one, is fully admitted.

United States v. *Ickes*, 84 F. 2d 228;
Boulder v. *Lewis*, 21 F. 2d 910;
Phillips v. *McCauley, Warden*, 92 F. 2d 790.

But the situation here is that no other remedy is possible and the question is neither moot nor is the action sought useless or futile.

The District Court expressly declared that it has not passed upon the merits of the application for an injunction but has merely denied the application to proceed *in forma pauperis* (App. IV). No appeal from an erroneous determination of a District Court lies to this Court, but only to the Circuit Court of Appeals. The petitioner did attempt to appeal to the Circuit Court of Appeals for the Ninth Cir-

cuit (Statement of Facts, p. 4). That Court did not dismiss the appeal and affirm the judgment or determination of the District Court, but declared that it had no power to hear the appeal and dismissed the petition for allowance of an appeal (App. V). This would not have been the basis for a writ of certiorari from this Court to the Court of Appeals, and no other form of appeal to this Court was available.

The petitioner is therefore in the position of not being permitted to appeal and therefore has no redress except by the extraordinary remedy of mandamus sought in this petition.

The District Court expressly declared that it placed its denial of the petition to appear as a poor person on the lack of citizenship, and not on the lack of a meritorious cause of action or of lack of good faith. If it had been the last reason, the statute requires that it be certified in writing, which was not done.

We must, therefore, assume that in the opinion of the court a person who has an obviously and concededly meritorious cause of action, who shows by clear and undisputed evidence that he is in good faith, and who is destitute, may not, if he is a convict, obtain redress in any form. To take an extreme case, a person seized, tried and convicted in open and flagrant violation of due process, may not thereafter, if he has no money or property whatever, sue out any writ or initiate any legal procedure whatever in the Courts of the United States, because Section 1915 of the Judiciary Code speaks of "citizens" only and a convict is declared by the District Court in this case not to be a citizen. He cannot appeal from his conviction because an appeal requires the payment of a fee—even if a moderate one. He cannot sue out a writ of habeas corpus for the same reason

and he is here denied the right to the extraordinary remedy of mandamus.

The only possible way by which he can bring the case before a Court in which he can have the merits of his case determined is to do as the petitioner does here, to ask that the Court be ordered to permit him to proceed *in forma pauperis.*

The Circuit Court of Appeals did not pass on the appeal from the District Court but (App. V) declared that it had no power to hear the appeal. This action of the Court of Appeals was doubtless based on the second paragraph of Section 1915 of the Judiciary Code in which the determination of the District Court on the question of good faith is declared to be final. But it is only a determination on that question, and only if so certified in writing, which is declared to be final and, by implication, unappealable. Any other determination of a District Court would come under the general rule and would be receivable by the Court of Appeals for the proper circuit under Section 291 of the Judiciary Code.

It might perhaps have been proper for the petitioner herein to ask that a writ of mandamus be directed to the Court of Appeals for the Ninth Circuit directing them to hear the appeal. It is submitted that the alternative procedure, here sought, by directing the District Court to permit the filing of the petition to proceed in forma pauperis, is a more direct and effective remedy which will expedite relief if this Court finds the petitioner entitled to relief. In the *Kawato* case (317 U. S. 69), a petition for a writ of mandamus from the Circuit Court of Appeals to the District Court was denied. The petitioner did not sue out a writ of certiorari in this Court, but petitioned for a writ of mandamus directly to the District Court, and this petition was granted.

III

The granting of a petition to proceed in forma pauperis is not wholly discretionary.

The Statute, as has been stated, uses the word "may." And it is often stated that the Court has discretion to grant or refuse a petition to proceed as a poor person.

Millslager v. *Olson, Warden*, 130 F. 2d 212.

But the discretion is not absolute. The Court must determine whether the petitioner is in good faith, which in this connection must mean whether he is in fact destitute, and whether he honestly and reasonably believes that he has a meritorious cause of action. On these matters the court may exercise its discretion, and if the discretion is not abused, the court's determination is final and under § 1915, 2nd par., no appeal can be taken. But it is only in the question of merits or good faith, that such a discretion exists, *Batson* v. *Squier*, 138 F. 2d 160. *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43.

Even here, in accordance with general rules on the subject of judicial discretion, it is possible to raise the issue of an abuse of discretion. That is to say, if no reason is apparent for doubting the good faith of the petitioner as to his oath of poverty and if, on its face, there is a basis for contending that the action sought to be commenced has merit—since by hypothesis the merits have not been examined—a petitioner may seek to have an arbitrary ruling denying him the right to appear as a poor person, set aside.

But if, as in this case, the good faith and the meritorious character of the cause of action are not in issue at all, there is no justification for the contention that the court may, without any reason or for a reason which, is in this case, can be shown to be clearly insufficient, deny a destitute person the right to proceed in forma pauperis.

IV

A citizen of the United States convicted of a felony does not lose his citizenship.

The one issue in this case is whether the District Court is right in its assertion that a person convicted of a felony and an inmate of a State's prison by reason of that conviction is not a citizen of the United States and therefore not within the group of persons who, under Section 1915 of the United States Judiciary Code may be authorized to proceed in forma pauperis.

The petitioner was beyond question a citizen of the United States at the time of his conviction. He swears in his affidavit attached to his petition to proceed in forma pauperis, that he was born in the State of Texas. The truth of this statement has at no time been questioned in this case (Appendix II).

He was, therefore, at the time of his conviction a citizen of the United States under the Fourteenth Amendment to the Constitution of the United States and under the Nationality Code of the United States, 8 U. S. C. A. § 601, a.

> "The following shall be nationals and citizens of the United States at birth:
>
> (a) A person born in the United States, and subject to the jurisdiction thereof."

In the same Nationality Code, Section 801, several ways are listed by which American Citizenship may be lost. They are numbered *a* to *j*. Only two have any reference to conviction of a crime, *g* and *h*.

Section 801 *g* lists among the means of losing citizenship, the following:

> "(g) Deserting the military and naval forces of the United States in time of war, provided he is convicted

thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the source of such military or naval forces."

Section 801 h provides the following:

(h) "Committing any act of treason against, or attempting by force to overthrow, or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction."

All the other situations listed by which American citizenship may be lost deal with acts taking an oath of allegiance to a foreign power or assuming voluntarily the duties of a citizen or a subject of a foreign power.

This list must be taken to be exhaustive. Nowhere in this Section or in any other Federal Statute or in the Constitution of the United States, is there any provision that conviction for a felony, whether in a State Court, or in the Federal Courts, has the effect of ending the citizenship of the person so convicted.

The case of *Gotscheus* v. *Matheson* (58 Barb. 152; 40 Howard Pr. 97; reversed on other grounds 61 N. Y. 420), which is cited in 11 Corpus Juris 786 and as authority for the proposition that conviction for a felony may cause the loss of citizenship, deals only with a Federal statute and applies only to conviction of the crime of desertion in time of war, which (supra pp. 12-13) is still under § 801g of the Nationality Code a ground declared by statute for ending the status of a citizen of the United States.

In that case (p. 158) it is stated:

"Congress has entire control of the question of citizenship."

This proposition, however qualified, is certainly true, so far as it asserts that whatever power exists to end citizen-

ship of a citizen of the United States, such power rests exclusively with the Federal Government. But if the determination of the District Court is right in this case, any State by statute, or in some other way, may deprive a citizen of the United States of its citizenship and do so for a reason that Congress has never adopted although Congress has specifically considered the situations which may cause the loss of citizenship and has listed them in the United States Nationality Code.

This could only mean that the Nationality Code of the United States is subject to the unrestricted amendment by any state. Whether, before the going into effect of the Fourteenth Amendment to the Constitution of the United States, any state could freely determine what citizenship in the United States was, need not be examined here. It is hard to see what argument can be advanced for the proposition that under the Fourteenth Amendment, any one of the forty-eight states may repeal or amend the Nationality Code of the United States.

V

The question of citizenship can be determined only by a judicial trial

In the case of *Carmichael* v. *Delaney*, 170 Fed. 2nd 239; the Court states:

> "The due process of law guaranteed by the Fifth Amendment would seem to require that a substantially supported claim of citizenship be accorded a judicial trial."

The court then quotes the opinion of Justice Brandeis in *St. Joseph Yards* v. *United States*, 298 U. S. 38, in which it is said:

> "A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the oppor-

tunity of a judicial determination of the facts. And so highly is this liberty prized that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Cf. Ng Fung Ho *v.* White, 259 U. S. 276, 282-283; United States *v.* Ju Toy, 198 U. S. 253 and Tang Tun *v.* Edsell, 223 U. S. 673, 675."

It is not always necessary to have a formal trial, but some hearing on the question of citizenship must be had with opportunity for evidence given and arguments heard.

In the case of this petitioner, over a claim of citizenship by birth in the United States, the Court undertook without any hearing of any sort to deny citizenship.

It is submitted that this runs counter to the decisions of this Court cited in the specially concurring opinion of Justice Brandeis, in which Justices Stone and Cardozo concurred.

VI

Neither "Civil Death" or loss of civil rights incident to conviction for felony, deprives a man of citizenship, and neither can have extra-territorial effect.

The term "civil death" has been applied in a number of states, including California (Penal Code Sects. 2601-2603) to the status of a person convicted of a capital crime and sentenced to life imprisonment. This is generally provided by explicit statutory enactment, but in some instances—not in California—has been declared to exist as part of the common law. It is derived from the common law situation in which, as is well known, all non-clergyable felonies were capital, the felon's body was at the disposal of the Crown and his property was forfeited, his personalty going to the Crown and his realty to his feudal lord, who after the 17th Century was also the Crown in most instances.

So far as execution for all felonies and forfeiture of property are concerned, these barbarities have long ago

been abolished in England and in all American states, but the status of "civil death" still remains in about one-third of the states.

Evidently this status, whatever its origin or its incidents, can exist only in the state that creates it. The majority of states do not have such a status. Clearly no state can provide that a person "civilly dead" within its own jurisdiction shall also be "civilly dead" in another state which either never had or has abolished the status.

Besides civil death, some states, including California, have provided that, if a person is sentenced to a state's prison for a term less than life, while he is not "civilly dead," his "civil rights" shall be "suspended." California Penal Code, § 2600, *Matter of Nerac*, 35 Cal. 392, 95 Am. Dec. 11.

Among the civil rights declared to be suspended, was the right to appear in court as a plaintiff, although he could be sued.

Coffee v. *Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

Even in California, accordingly, the petitioner in this case would not be "civilly dead," but would at most have his civil rights suspended. On the most favorable construction of the determination of the District Court in this case, we might say that, when the Court said that the petitioner was not a citizen, it meant that since he could not by the law of California appear as a plaintiff at all, he could not appear as a poor person.

But it is an elementary principle of the conflicts of laws that a procedural incapacity created by one state cannot affect the right of the person to sue in another, and even "civil death" in its extreme form and strictly construed

as the equivalent of bodily death, cannot create such a status in another state.

Story on the Conflict of Laws, 8th Ed. (1883) § 620;
2 Beale on the Conflict of Laws, 657; Sect. 120.6 and 120.7;
Restatement of the Conflict of Laws, § 120, a.

Mr. Justice Story adverts to the fact some foreign jurists regard the status of civil death as accompanying the person so characterized everywhere and points out that the common law of England and the United States, as well as the law of many Continental authorities, has always expressly repudiated this doctrine, since any penal law—and this is a highly penal one—will not be enforced outside of the jurisdiction in which the law is passed.

The leading case on the subject is *Logan* v. *United States*, 144 U. S. 263, where at p. 303, the Court says:

> "At common law and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered."

The Court cites *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and several state cases to which may be added:

Folliott v. *Ogden*, 1 Henry Blacks. 135;
Wolff v. *Oxholm*, 3 M. and Selw. 99.

In the United States this has been expressly held in *Wilson* v. *King*, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802 (1894), wherein the case of a person convicted of a capital offense in Tennessee, and declared civilly dead by the laws of that state, the court says:

> "The conviction and sentence of King in the State of Tennessee did and does not affect his right to sue and recover in this state (i.e., Arkansas)." (The court quotes the passage from Story cited above.)

And finally attention should be called to the fact that the Attorney General of the State of California has on two occasions declared it to be his opinion that conviction of a felony whether for life or for a term of years does not deprive a convict of his citizenship. The most recent is the opinion delivered by the Attorney General of California on September 11, 1946 (6 Op. Atty. Gen. of Calif. 115, 116) in which citing his former opinion, the Attorney General said:

> "We expressed the view that such provision of the Federal Constitution (i. e. the Fourteenth Amendment) fixed citizenship and the state has not the power to deprive a person of either state or federal citizenship."

This is somewhat less than a judicial determination. If it had been, even of the lowest state court, it would have been binding in the Federal Courts under the rule announced in *Erie R. R.* v. *Tompkins*, 304 U. S. 64. But it is persuasive, especially in the complete absence of judicial decisions in California, that even in that state, neither "civil death," nor suspension of "civil rights" produces a loss of citizenship within the state, and *a fortiori* could have no such effect in another jurisdiction.

VII

The cases cited to the District Court in support of the determination that petitioner is not a citizen are not authoritative.

The court rests its determination that the petitioner, being a convict, is not a citizen on the cases of *Austin* v.

United States, 40 Fed. Supp. 777 and *Amy* v. *Smith*, 11 Ky. 326.

There is no doubt that in the *Austin* case, the District Court reached the same conclusion as a matter of law, which was reached by the court in this case. The court held that the petitioner having been convicted of an infamous crime was not a citizen and therefore not entitled to sue in forma pauperis under 28 U. S. C. A. 1915.

The Court apparently qualifies this by referring to the status of the petitioner in the *Austin* case, as "something less than that of full citizenship" and "not a fully qualified citizen." Just what basis there is for distinguishing degrees of citizenship and making some "full" and others, "less full", is not apparent, but there is no doubt that the Court in the *Austin* case is dealing with a situation very difficult to distinguish from the case of the petitioner herein.

It is submitted the Court in the *Austin* case was in error. The only authority it cites is the case of *Amy* v. *Smith* (*supra*, p. 19), and it must be assumed that it regards that case as controlling.

Amy v. *Smith* was decided in Kentucky in 1822, before the Fourteenth Amendment.

The plaintiff Amy—called "a woman of color" in the title of the case—was a slave. The Court of Kentucky held that under existing law, every state had the right to make citizens of any persons it chose, and that in Kentucky, only white persons were citizens.

Indeed, the Court asserts (p. 334) that "the laws of the United States do not now (i. e. in 1822) authorize any but a white person to become a citizen."

These propositions need merely to be stated to show how wholly inapplicable they are to a situation arising at the present time, when citizenship under the Fourteenth

Amendment is a matter "exclusively" under the control of the Federal government. That the case of *Amy* v. *Smith* would today be wholly without authority is clear, and since the *Austin* case rests upon the *Amy* case, it must necessarily fall with it.

It may be noted that even in the *Amy* case, the situation dealt with was one in which the plaintiff had never been a citizen, and not one in which a person, concededly once a citizen, was deprived of that status. It may therefore be said that the sole authority quoted by the Court in the *Austin* case offers very dubious justification for the conclusion, even if the *Amy* case could seriously be taken as enunciating a valid rule of law.

And it is further to be noted that in Kentucky where the case of *Amy* v. *Smith* arose, it was expressly decided that the going into effect of the Fourteenth Amendment, completely changed the situation.

Marshall v. *Donovan*, 73 Ky. 681, 688.

VIII

"Civil Death" and similar disabilities are anomalous fictions which should not be extended.

The fictitious character of the doctrine of "civil death" at common law and elsewhere has often been noted. It has been discussed in a number of articles in law reviews of which the following may be mentioned:

27 Cornell Law Quarterly, 90;
37 Georgetown Law Review, 438;
33 Minnesota Law Review, 319;
17 St. Johns Law Review, 46-49.

In every instance it was pointed out that it was a vestigial medieval fiction, wholly without value or significance for modern times.

In 50 Harvard Law Review, 968-977, the entire effect of the status of civil death is examined. The article begins with the sentence:

> "With living men regarded as dead, dead men returning to life, and the same man considered alive for one purpose but dead for another, the realm of legal fiction acquires a touch of the supernatural under the paradoxical doctrine of civil death."

On p. 972, the writer points out that even so far as disability to sue was concerned, the doctrine was subject to many qualifications, quoting Coke on Littleton, 130a and 1 Chitty on Criminal Law 747, where it was recalled that even a convicted felon could sue to have his attainder reversed.

Another summary of the situation created by this medieval fiction is to be found in a standard work on Criminology: Sutherland, Edwin H.; principles of Criminology (3rd ed. 1939) pp. 577-583, where the lack of any relation of this incident of conviction to rational doctrines of punishment is made clear.

IX

The Writ of Mandamus Should Issue

By reason of the foregoing, it is respectfully submitted that a writ of mandamus should issue to the District Court for the Northern District of California directing that the petition of the petitioner herein, William H. Roberts, be heard on the good faith of his petition to file his suit for an injunction in forma pauperis; or, in the alternative, that a writ of mandamus should issue to the Court of Appeals for

the Ninth Circuit directing that court to hear the appeal of the petitioner from the determination of the District Court.

Respectfully submitted,

MAX RADIN,
Counsel for Petitioner,
By Appointment of the Supreme Court.

Duke Law School,
Duke University,
Durham, North Carolina.

APPENDIX I

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

The Honorable Fred M. Vinson, the Chief Justice

No. —

WILLIAM HENRY ROBERTS, *Petitioner,*

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION, AND THE HONORABLE DAL M. LEMMON, Judge, Presiding Therein, *Respondent*

Summary Calendar—Application for Leave of the Court to Proceed in Forma Pauperis

To The Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America, Greetings:

I

Comes now the above named petitioner, William Henry Roberts, in propria persona and respectfully applies to the Honorable The Supreme Court of The United States of America, The Chief Justice and Associate Justices thereof: for leave of the Court to file with and in the said Supreme Court of the United States of America and to proceed in forma pauperis, for consideration and determination by the Court, a petition for a Writ of Mandate Directed to the United States District Court for the Northern District of California, Northern Division, Honorable Dal M. Lemmon, Judge, thereof, and in which said petition the fundamental question of America Citizenship and the rights to petition the Federal Courts in particular instances in forma pauperis will be the points involving Law, and for which

an affidavit in forma pauperis is hereto attached (Post) for the intents and purposes here in above shown.

Your Petitioner Will Ever Pray:

Respectfully,

WILLIAM HENRY ROBERTS,
Petitioner in Pro. Per.

APPENDIX II

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

The Honorable Fred M. Vinson, the Chief Justice

No. —

WILLIAM HENRY ROBERTS, *Petitioner,*

vs.

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION, AND THE HONORABLE DAL M. LEMMON, Judge, Presiding Therein, *Respondent*

Affidavit in Forma Pauperis

Affidavit

THE UNITED STATES OF AMERICA,
State of California,
County of Sacramento, ss.

William Henry Roberts, having been first duly sworn and subscribed, upon Oath, states and Deposes: That, he is the petitioner named in the foregoing and attached application to proceed in and before the Honorable Supreme Court of The United States of America. That, *He is a Citizen of the United States of America and of the State of Texas, by virtue of Birth*, and that he is of lawful age;

That, He is a party thereto to the said action in mandate therein mentioned.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

No. —

WILLIAM HENRY ROBERTS, ex rel., et al., Inmates of the California State Prison for Men at Represa, California, *Relator,*

v.

THE STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS, RICHARD A. McGEE, Director, and ROBERT A. HEINZE, Warden, et al., *Respondents*

Order

William Henry Roberts requests leave to file an action in forma pauperis. In the action an injunction is sought enjoining the prison authorities at a California Prison from enforcing certain rules and an attack is made upon certain sections of the California Penal Code on constitutional grounds.

The supporting affidavit states that he is a citizen. It appears that he is a prisoner confined in that prison. He has been convicted of a felony. California Penal Code, Section 18. As such he is not a citizen. Austin v. United States, 40 F. Supp. 977; Amy v. Smith, 11 Ky. 326. His request is denied, 28 U. S. C., Section 1915.

Dated: December 23, 1948.

DAL M. LEMMON,
United States District Judge.

APPENDIX IV

Endorsed: Filed Jan. 3, 1949. C. W. Calbreath, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

WILLIAM HENRY ROBERTS, ex rel., et al., Inmates of the California State Prison for Men at Represa, California, *Relator*,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS, RICHARD A. MCGEE, Director, and ROBERT A. HEINZE, Warden, et al., *Respondents*

Order

Relator William Henry Roberts has directed to me an application for extension of time for filing petition for rehearing. In the application he states that on the 23rd day of December, 1948 I "denied the said application for the injunction". In this he is in error. I have never denied his application for injunction. I have denied his application to appear in forma pauperis.

His application for extension of time to file petition for rehearing is denied.

Dated: January 3rd, 1948.

DAL M. LEMMON,
United States District Judge.

APPENDIX V

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM HENRY ROBERTS, ex rel., et al., Inmates of the California State Prison for Men at Represa, California, *Appellants in Error,*

vs.

THE STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS; RICHARD A. McGEE, Director, and ROBERT A. HEINZE, Warden, et al., *Appellees in Error*

Roberts petitions for allowance of an appeal from a judgment in the United States District Court for the Northern District of California, denying him the right to sue in forma pauperis.

This court has no power to grant an application for allowance of an appeal. The petition is dismissed.

WILLIAM DENMAN,
HOMER T. BONE,
WILLIAM E. ORR,
Judges, United States Court of Appeals, Ninth Circuit.

Endorsed: Filed: January 27, 1949, Paul P. O'Brien, Clerk.

APPENDIX VI

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 130

WILLIAM HENRY ROBERTS, ex rel., et al., Inmates of the California State Prison for Men at Represa, California, *Appellants*,

vs.

THE STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS, RICHARD A. McGEE, Director, and ROBERT A. HEINZE, Warden, et al., *Appellees*

Miscellaneous

Upon Application of William Henry Roberts for a Stay of Proceedings

Before Denman, Chief Judge, Bone and Orr, Circuit Judges

The application for a stay of proceedings is denied.

WILLIAM DENMAN,
HOMER T. BONE,
WILLIAM E. ORR.

Endorsed: Filed: February 7, 1949, Paul P. O'Brien, Clerk.